PP v. KASMARUGAYA SULAIMAN

HIGH COURT MALAYA, JOHOR BAHRU
COLLIN LAWRENCE SEQUERAH J
[CRIMINAL TRIAL NO: 45B-09-05-2017]
30 APRIL 2019

CRIMINAL LAW: *Penal Code – Section 302 – Murder – Accused charged for offence of murder – Deceased died due to blunt force trauma and profuse bleeding – Whether there were eyewitnesses who saw accused beating deceased – Whether accused only person with deceased – Whether fact that deceased last seen alive together with accused enough to implicate accused – Whether there was possibility that accused did not cause death – Whether circumstantial evidence pointed to guilt of accused and only accused – Whether ingredients of offence proved – Whether prosecution successfully established prima facie case*

EVIDENCE: *Circumstantial evidence – Murder – Accused charged for murder – Deceased died due to blunt force trauma and profuse bleeding – Prosecution's case built on circumstantial evidence – Whether circumstances from which conclusion of guilt was to be drawn established – Whether facts established consistent with hypothesis of guilt – Whether chain of evidence complete so as to exclude any conclusion consistent with accused's innocence – Whether circumstantial evidence pointed to guilt of accused and only accused – Penal Code, s. 302*

EVIDENCE: *Witness – Admissibility – Accused charged for murder – Witness gave partial evidence before disappearing – Whether police took all necessary steps to ascertain whereabouts of witness – Whether witness could not be found – Whether partial evidence by witness ought to be admitted – Evidence Act 1950, s. 32(1)(i) – Criminal Procedure Code, s. 112*

Upon receiving an information about a man ('the deceased') lying at the back of a hotel and bleeding, the police proceeded to the said hotel and found the deceased in a critical condition and breathing heavily. The deceased was rushed to the hospital where he died the next day. A post-mortem report revealed that the cause of death was 'acute subdural haemorrhages due to blunt force trauma' and such injury could have caused death due to profuse bleeding. Investigations led to the arrest of the accused and he was charged at the High Court for murder, an offence under s. 302 of the Penal Code ('PC'). The main plank of the prosecution's case rested upon the sole testimony of SP10, a friend of both the accused and deceased. According to SP10, (i) there was a misunderstanding between the deceased, the accused and himself; (ii) the deceased owed the accused and himself some money; (iii) the deceased wanted to meet up but SP10 did not go. Instead the accused and two others ('the three persons') went to the back of the hotel; (iv) 20 minutes later, the three persons met up with SP10 at a different place

and when SP10 asked about the whereabouts of the deceased, he was told that the latter had been beaten up; and (v) SP10 did not know which body part of the deceased was hit and the object he was hit with. One of three persons, SP9, testified during examination-in-chief that, on the fateful day, the accused was at the back of the hotel. However, that was the only significant thing he said as he disappeared and did not show up at court again to continue giving his testimony. The police officer ('SP16') tasked with locating SP9 testified that his efforts to locate the latter proved unsuccessful as: (i) it was only during the third day of the trial did he realise that SP9, while he gave evidence, was in fact remanded in prison and later released; (ii) SP9's address did not exist; and (iii) searches conducted at the National Registration Department and Employees Provident Fund and through advertisements bore no fruit. The prosecution applied to admit SP9's statement, made under s. 112 of the Criminal Procedure Code ('CPC'), on the ground that as all efforts were made to discern the whereabouts of SP9 were without success, he was a person who could not be found within the meaning of s. 32(1)(i) of the Evidence Act 1950 ('the Act'). The prosecution further submitted that according to the 'last seen together' principle, and because the deceased was last seen alive with the accused and SP9, this was sufficient to implicate and connect the accused to the crime.

Held (acquitting and discharging accused without calling him to enter defence):

(1) The only person at the scene, besides the accused, who could have shed any light on what happened to the deceased, was SP9. However, SP9 gave partial evidence which did not implicate the accused. SP10 did not go with the rest but waited elsewhere and was only informed that the deceased had been beaten. SP10 did not know which part of the deceased's body was hit, the object used to hit him and who had beaten up the deceased. There was no eyewitness who testified that it was the accused who beat up the deceased. It was clear that the prosecution's case was premised upon circumstantial evidence. (paras 50-53)

(2) Where evidence is circumstantial, certain principles of law are called into operation. Conviction could be secured based on circumstantial evidence provided that (i) the circumstances from which the conclusion of guilt is to be drawn has been established; (ii) the facts so established is consistent with the hypothesis of guilt; and (iii) circumstances should be of a conclusive nature in that the chain of evidence is complete so as to exclude any conclusion consistent with the accused person's innocence. (paras 54 & 55)

(3) Although there were three persons present at the scene, including the accused, the following questions necessarily arose: (i) did all three beat up the deceased; (ii) if all three had beaten up the deceased, what

weapons, if any, were used; (iii) who, among the three persons, inflicted the fatal blow; (iv) did only two of them beat up the deceased; and (v) was it only the accused who beat up the deceased. These questions did not admit of any answers. More importantly, they did not point to only one conclusion – and one conclusion only – that it was the accused who committed the act. (paras 59 & 60)

(4) The application of s. 32(1) of the Act is not automatic in nature. As it is an exception to the hearsay rule, the provision must be applied strictly. The necessity principle entails asking the question: have the police taken all necessary steps to ascertain the whereabouts of the maker of the statement? No attempt was made to utilise the available procedures under the CPC with a view to securing SP9's attendance after his release. Therefore, the efforts made by the police, including the steps taken to locate SP9, came too late in the day and was due to sheer negligence in not realising that he was under detention in person. He was not a person who could not be found. The prosecution's application under s. 32(1)(i) of the Act was dismissed. (paras 81, 82, 85, 87 & 88)

(5) Bereft of the statement of SP9, there was nothing to directly implicate the accused with the death of the deceased. The available evidence did not explicitly also exclude the involvement of the others present. It could not be presumed that the accused either inflicted the fatal blow or was one of those who beat up the deceased with the others. It could not also be assumed that the accused might have been guilty of the fact that he was present and did nothing to stop the others from beating up the deceased, especially so in the absence of employing s. 34 of the Penal Code with regard to common intention. Mere suspicion could not substitute for proof. Furthermore, there was also no forensic evidence to link the accused to the crime committed. In fact, the pathologist who conducted the post mortem agreed that it was possible that there was more than one person involved in the murder because the injuries were not only confined to the front and back but also the chest. (paras 89-91)

(6) Based on the 'last seen together' theory, where an accused is last seen with the deceased, in the absence of any plausible explanation by the accused, it could lead to a presumption of guilt although this is not necessarily conclusive. The problem with the application of the theory here is the fact that there was more than one person present at the scene. The theory would certainly work to the advantage of the prosecution if there was only one person present at the scene for then the particulars or special facts within his knowledge would require him to provide some explanation for what happened in order to discharge the burden. However, the particulars of the present case made the application of such theory fraught with difficulties. In any event, all the evidence did was place the accused with two others at the scene. (paras 64-67)

(7) The prosecution failed to prove that the injuries sustained by the deceased were caused by, or were the result of the act of, the accused. The individual strands of evidence did not converge to form a rope strong enough to consign the accused to the fate of hanging. There were unexplained gaps in the prosecution's case. The prosecution failed to make out a *prima facie* case against the accused in respect of murder under s. 302 of the PC. (paras 93, 95 & 98)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Chwen Kong v. PP [1962] 1 LNS 22 CA ***(refd)***
Chang Kim Siong v. PP [1967] 1 LNS 18 FC ***(refd)***
DA Duncan v. PP [1980] 1 LNS 12 FC ***(refd)***
Jayaraman & Ors v. PP [1982] 1 LNS 126 FC ***(refd)***
Karam Singh v. PP [1967] 1 LNS 65 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mohd Fazli Azri Jamil lwn. PP [2013] 1 LNS 1237 CA ***(refd)***
Poh Weng Nam v. PP & Another Appeal [2013] 4 CLJ 1096 CA ***(refd)***
PP v. Azilah Hadri & Anor [2015] 1 CLJ 579 FC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No. 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Lee Jun Ho & Ors [2009] 4 CLJ 90 HC ***(refd)***
PP v. Lim Bong Kat & Anor [1992] 4 CLJ 2173; [1992] 3 CLJ (Rep) 380 HC ***(refd)***
PP v. Magendran Mohan [2005] 3 CLJ 592 HC ***(refd)***
PP v. Megat Shahrizat Megat Shahrur [2011] 8 CLJ 893 FC ***(refd)***
PP v. Michael Anayo Akabogu [1995] 4 CLJ 79 HC ***(refd)***
PP v. Mohd Jamil Yahya & Anor [1993] 1 LNS 95 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Norfaizal Mat (No. 2) [2008] 8 CLJ 576 HC ***(refd)***
PP v. Thenegaran Murugan & Another Appeal [2013] 4 CLJ 364 CA ***(refd)***
Rakesh Kumar Thangagrajoo lwn. PP & Kes Lain [2017] 1 LNS 502 CA ***(refd)***
Sainal Abidin Mading v. PP [1999] 4 CLJ 215 CA ***(refd)***
Sunny Ang v. PP [1965] 1 LNS 171 FC ***(refd)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***
Yii Soon Ho v. PP [2014] 1 LNS 386 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 34(2), 35, 36, 47, 49, 111(1), (2), 112, 118, 180(2), 404
Evidence Act 1950, s. 32(1)(i)
Penal Code, ss. 34(2), 299, 300, 302, 326

For the applicant - Iffa Zarilla Abd Rahman & Mustaqim Sukarno; DPPs
For the respondent - N Maripayan; M/s N Mariappan & Assocs

Reported by Najib Tamby

JUDGMENT

Collin Lawrence Sequerah J:

Introduction

[1] The accused abovenamed was charged for the following:

> Bahawa kamu pada 10 September 2016 di antara jam lebih kurang 5.00 pagi hingga 6.30 pagi, di Lorong Belakang T-Hotel Wong Ah Fook, dalam Daerah Johor Bahru, dalam Negeri Johor Darul Takzim telah melakukan kesalahan membunuh dengan menyebabkan kematian ke atas Abd Razak bin Ibrahim (No K/P: 741108-01-5713) dan dengan itu kamu telah melakukan satu kesalahan yang boleh di hukum di bawah Seksyen 302 Kanun Keseksaan.

Prosecution Case

[2] On 10 September 2016 at around 7.15am, after SP3 had completed his duty at the Ayer Molek lock up, he headed towards the IPD Johor Bahru South and stopped by a provision shop to buy some cigarettes.

[3] While there, he received information about a male Malay lying at the back of T-Hotel and who was bleeding. After SP3 received the said information, he proceeded to the back of T-Hotel and found a male Malay ("deceased") lying down unconscious and bleeding from the mouth.

[4] The deceased at the time was in critical condition and breathing heavily. SP3 then called the control centre ("pusat kawalan") Daerah JB and informed of the deceased's condition.

[5] SP3 then waited for the arrival of the police and the ambulance after which he then left the scene.

[6] SP1 was on duty at the control centre ("pusat kawalan") Daerah JB on 10 September 2016 at around 7.15am when he received a phone call from SP3 informing him that a male Malay ("deceased") was lying bleeding and in a critical condition at Lorong Belakang T-Hotel, Jalan Wong Ah Fook, JB. SP1 lodged a police report regarding the said information as per JBS Report: 17150/16 ("P4").

[7] The case initially was investigated by SP15 and the case at first classified under s. 326 of the Penal Code while the deceased was warded at the emergency ward at the Sultanah Aminah Hospital JB ("HSA").

[8] The next day 11 September 2016, SP15 was informed by SP4 that the deceased had died. The death certificate was marked as P8. After the death, the investigation papers were taken over by SP17 and re-classified under s. 302 of the Penal Code.

[9] SP5, the wife of the deceased, said that she was informed by the police that her husband had passed away on 11 September 2016 while at the HSA. SP5 then lodged police reports (P9) and (P10) respectively. SP5 also identified the deceased from exh. P7 (5-7).

[10] SP6 went to the scene on 11 September 2016 at around 5pm and carried out examination on the premises. SP6 collected DNA samples from the wall using a swab stick (as shown in the marking "X" to exh. P7 (1-2)) and later handed the exhs. P13, P12, P12(A)(1) and P12(A)(1)(a) over to Inspector Jagjit Singh.

[11] The DNA exhibits were sent to the Chemistry Department Johor for analysis by SP7. The DNA samples from the bloodstains taken showed that it had a similar profile to the deceased's blood specimen.

[12] A post-mortem was carried out by SP14 and the results were also reduced to a post mortem report, exh. P32. According to SP14, the cause of death was "Acute Subdural Haemorrhages due to Blunt Force Trauma" and such injury could have caused death due to profuse bleeding.

[13] SP14 also said that the object that could have caused such injury was a blunt object such as a hand, feet, feet with shoes, a stick or any metal object that could be classified as a blunt object. The injuries could also have been caused due to more than one blow using a blunt object.

[14] The forensic specimens were analysed by SP11 and the results contained in exh. P22. A DNA comparison analysis was carried out by SP7 as reflected in exh. P14 and contained in a report, exh. P15. The analysis showed that the bloodstains on the cotton swab belonged to the deceased.

[15] SP10 testified that he is a friend of the deceased also called "Wan" as well as the accused also known as "Man Toka". SP10 said there was a misunderstanding that occurred between the deceased, the accused and himself regarding the towing of a motorcycle. SP10 also said that the deceased owed the accused and himself some money.

[16] SP10 said that on 10 September 2016 at around 5.30am, friends of his also known as "Man Cagar" and "Lan Sabar" met him and informed him that the deceased wanted to meet up.

[17] SP10 said that he replied that they should wait until the accused or "Man Toka" arrived in order to "corner" the deceased in order to discuss the dispute between them.

[18] SP10 however said that he did not go to the scene where the deceased was beaten up. SP10 said that it was the accused, Man Cagar and Lan Sabar who went to the scene which he described as a "lorong tikus belakang T-Hotel, kedai makan" or back alley to meet with the deceased while SP10 said that he waited at a place called the Port next to City Square.

[19] After about 20 minutes, the three of them arrived at the Port next to City Square. SP10 said that he then asked where was "Wan" meaning the deceased. In response, Lan Sabar informed him that the deceased had been beaten up. SP10 said that he did not know which part of the body the deceased was hit and with what object.

[20] SP9 is one Rosman bin Karim who partially gave evidence by way of examination in chief but subsequently did not appear in court to continue giving his testimony.

[21] SP9 said that he knew the deceased and that on 10 September 2016 between 5am to 6.30am he was at the back of T-Hotel at Jalan Wong Ah Fook. That was the only significant thing he said however.

[22] The accused was arrested on 11 September 2016 at around 10pm by SP13 who duly lodged Taman Pelangi report 8283/16. The accused was handed by Inspector Parthiban to SP17 on the same day and placed in the lock up.

Analysis Of The Prosecution Case

[23] The accused stands charged for murder under s. 302 of the Penal Code. Section 302 prescribes the punishment for whoever commits murder. Murder itself is defined in s. 300 of the Penal Code.

The Difference Between Culpable Homicide And Murder

[24] In evaluating whether the prosecution has successfully made out a *prima facie* case against the accused for murder under s. 302, it is important to first distinguish between the offence of culpable homicide under s. 299 and murder under s. 300.

[25] This is because all murder is culpable homicide but not all culpable homicide is necessarily murder. It is therefore imperative for the court to appreciate the fine but discernible difference between the two in order to make the correct finding as to whether or not the evidence disclosed reflects the offence of culpable homicide not amounting to murder or culpable homicide amounting to murder.

[26] Section 299 of the Penal Code defines the offence of culpable homicide as follows:

> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

[27] Section 300 of the Penal Code describes murder in the following terms:

> Except in the cases hereinafter excepted culpable homicide is murder:
>
> (a) If the act by which the death is caused is done with the intention of causing death;
>
> (b) If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

A (c) If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily
B injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[28] Section 300 goes on to set out a number of exceptions which operate to reduce murder to culpable homicide not amounting to murder. These
C exceptions are provocation, exceeding private defence, exceeding the powers of a public servant, sudden fight and consent. None of them are relevant here at this juncture.

[29] From a perusal of both ss. 299 and 300, it is clear that some cases of culpable homicide will amount to murder while some will be classified as
D culpable homicide not amounting to murder.

[30] Because of the similarity in wording, the distinction between the two is so fine as to be almost indiscernible. This court is therefore grateful for the assistance of high authority that has emanated from one of the most distinguished legal minds in this country.

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[31] In the case of *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174, Raja Azlan Shah J (as His Highness was then) held as follows:

> ... A comparison that frequently arises in the application of sections 299 and 300 is the tenuous contention that section 299 is not a substantive
F offence and therefore is either murder or culpable homicide according to whether or not one of the exceptions to section 300 apply, and if by reason of the absence of the necessary degree of *mens rea* an offence does not fall within section 300, it cannot be one of culpable homicide not amounting to murder ... but would amount to causing grievous hurt. *In our view, the correct approach to the application of the two sections is this. Section*
G *299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to section 300, Penal Code apply, and (b) where the necessary degree of mens rea specified in section 299 is present, but not the special degrees of mens rea referred to in section 300, Penal Code. We would like in this connection to express the need to bear in mind that all cases falling under section 300*
H *Penal Code must necessarily fall within section 299, but all cases falling within section 299 do not necessarily fall under section 300 ...* (emphasis added)

[32] The case of *PP v. Megat Shahrizat Megat Shahrur* [2011] 8 CLJ 893 echoed and quoted *verbatim* the relevant excerpts in *Tham Kai Yau (supra)* and added:

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> The first part of section 304, Penal Code covers cases which by reason of the exceptions are taken out of the purview of section 300, clauses (1), (2) and (3) but otherwise would fall within it and also cases which fall within the second part of section 299, but not within section 300, clauses

(2) and (3). The second part of section 304, Penal Code covers cases falling within the third part of section 299 not falling within section 300, clause (4).

Thus, *if death is an imminent result, it falls under s. 300. If on the other hand, that death is a likely result, it falls under s. 299. It would be safe to conclude that all cases under s. 300 would fall under s. 299 as well, but this is not necessarily so vice versa*. (emphasis added)

[33] See also *Poh Weng Nam v. PP & Another Appeal* [2013] 4 CLJ 1096, *PP v. Thenegaran Murugan & Another Appeal* [2013] 4 CLJ 364 and *Mohd Fazli Azri Jamil lwn. PP* [2013] 1 LNS 1237 which espouses the same principles.

[34] From a distillation of the abovementioned authorities, the position can be summarised as follows. The difference between s. 299 and s. 300 lies in the degree of probability or likelihood that death would result from a particular act ie, the degree of risk to human life. If death is a likely result of the act, it is culpable homicide, if it is the most probable result, it is murder. If death is imminent, it is also murder.

[35] Culpable homicide may not amount to murder where the evidence is sufficient to constitute murder, but one or more of the exceptions to s. 300 apply, for example provocation, right of private defence and sudden fight and where the necessary degree of *mens rea* in s. 299 is present but not the special degrees of *mens rea* referred to in s. 300 of the Penal Code.

[36] Bearing the above in mind, it is now necessary to consider the ingredients of the offence of murder which the prosecution must establish in order to make out a *prima facie* case.

[37] The necessary ingredients to be proven in a charge of murder under s. 302 Penal Code.

[38] The necessary ingredients that must be proven by the prosecution in a charge of murder was set out in the Court of Appeal case of *Sainal Abidin Mading v. PP* [1999] 4 CLJ 215; [1999] 4 MLJ 497, and in the context of that case were expressed to be as follows:

The ingredients are:

[1] That Isnidil bin Rasin is dead;

[2] That Isnidil bin Rasin died as a result of injuries sustained by him;

[3] That the injuries of Isnidil bin Rasin were caused or the result of the act of the appellant;

[4] That in inflicting the injuries upon Isnidil bin Rasin, the appellant either:

(a) caused them with the intention of causing death; or

(b) caused them with the intention of causing such bodily injuries as the appellant knew to be likely to cause the death; or

A (c) caused them with the intention of causing bodily injuries and such bodily injuries were sufficient in the ordinary course of nature to cause death.

The Said Abdul Razak Ibrahim Is Dead

B **[39]** SP5 is the wife of the deceased and she duly identified her husband as the deceased. Besides SP5, SP14 and SP17 also identified the deceased. There was also no dispute as to the identity of the deceased. The prosecution had therefore proven the first ingredient.

The Deceased Died As A Result Of The Injuries Sustained By Him

C **[40]** SP14 who conducted the post-mortem testified that there were more than 22 injuries of various types such as bruises, abrasions and tears on the deceased.

[41] A summary of SP14's findings was that the multiple blunt injuries seen on the head, face and torso were due to direct impact and these injuries were D sustained within 24 to less than 36 hours prior to the deceased's demise as combination of acute and chronic inflammatory cells seen microscopically.

[42] The direct impact to the head resulted in acceleration and deceleration injuries which caused lacerated cortical brain blood vessels with subsequent E subdural haematoma.

[43] It was also opined that the impact on the head resulted in traumatic brain injuries leading to brain swelling (cerebral oedema). The combination of swollen brain and subdural bleeding resulted in increased intracranial pressure which caused secondary haemorrhages in the brainstem.

F **[44]** Brainstem haemorrhage was incompatible with life due to loss of body control over the cardiorespiratory centre which regulated normal breathing and heart pumping functions.

[45] SP14 said the cause of death was "Acute Subdural Haemorrhages due G to Blunt Force Trauma". SP14 also said that the injuries were sufficient in the ordinary course of nature to cause death.

[46] SP14 also testified that the injuries sustained to the upper part of the body did not lead to death but were consistent with self-defence wounds.

H **[47]** Based on the foregoing, it can be reasonably concluded that the prosecution had proven the second ingredient of the offence of murder.

The Injuries To The Deceased Were Caused Or Was The Result Of The Acts Of The Accused

[48] The main plank of the prosecution case rests upon the sole testimony I of SP10. To recapitulate, SP10 testified that he is a friend of the deceased as well as the accused and that there was a misunderstanding between the deceased, the accused and himself regarding the towing of a motorcycle as a result of which SP10 said that the deceased owed himself and the accused some money.

[49] SP10 then said that on 10 September 2016, the accused, a person known as Man Cagar, which from the evidence can be concluded to be SP9 or Rosman bin Karim and Lan Sabar, whose actual name is Azlan bin Sali, who was not called as a witness, went to a lane behind the T-Hotel and met up with the deceased in order to discuss the misunderstanding. It is to be noted that one among the two persons besides the accused was PW9 who as stated earlier, did not complete giving his testimony.

[50] This effectively meant that the only person at the scene besides the accused who could have shed any light on what happened to the deceased was SP9 who gave partial evidence which did not implicate the accused.

[51] SP10 said that he himself did not go with the rest but waited elsewhere. After about 20 minutes, the three of them came back and one of them informed him that the deceased had been beaten up.

[52] SP10 said that he did not know which part of the body the deceased was hit and with what object. He also did not state who beat up the deceased. There are therefore no eyewitnesses who testified that it was the accused who beat up the deceased.

[53] From the above therefore, is clear that the prosecution case is premised upon circumstantial evidence.

Circumstantial Evidence

[54] Where the evidence is circumstantial, certain principles of law are called into operation. The following cases afford useful guidelines as to what they are.

[55] In the case of *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579, it was held:

> The prosecution's case rests substantially or entirely on circumstantial evidence. It is trite that direct evidence of the commission of the offence is not the only source from which a trial court can draw its conclusion prior to a finding of guilt. **Conviction can be secured based on circumstantial evidence provided that**:
>
> *(a) the circumstances from which the conclusion of guilt is to be drawn has been established;*
>
> *(b) the facts so established is consistent with the hypothesis of the guilt; and*
>
> *(c) circumstances should be of a conclusive nature in that the chain of evidence is complete so as to exclude any conclusion consistent with the accused person's innocence* (See *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1, *Mazlan Othman v. PP* [2013] 1 CLJ 750; [2013] 1 AMR 615; *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; *Chan Chwen Kong v. Public Prosecutor* [1962] 1 LNS 22).

A It is worth noting that the court had this to say in *PP v. Letchumanan Krishnan* [2007] 1 LNS 409; [2008] 3 MLJ 290:

> It is axiomatic under our case-law, and we cite the principle repeatedly, that *circumstantial evidence alone may be sufficient to support a conviction for murder since the law makes no distinction between*
B *circumstantial evidence and direct evidence and, if circumstantial evidence is used to provide for a conviction; it must be inconsistent with any other hypothesis than that of guilt of the accused*. (See e.g., *Kartar Singh & Anor v. R* [1952] 1 LNS 43; [1952] 2 MLJ 85; *Idris v. PP* [1960] MLJ 296, *Sunny Ang v. PP* [1965] 1 LNS 171; [1966] 2 MLJ; *Karam Singh v. PP* [1967] 1 LNS 65; [1967] 2 MLJ 25; *Chong Kim Siong v. PP*
C [1967] 1 LNS 18; 1 MLJ 36; *PP v. Hanif Basree Abdul Rahman* [2007] 2 CLJ 33; [2007] 2 MLJ 320 and *Juraimi bin Jussin v. PP* [1998] 2 CLJ 383; [1998] 1 MLJ 537).

Faizal Ali J when delivering the judgment of the Supreme Court in *Ram Avtar v. The State (Delhi Administration)* AIR [1985] SC 1692, had
D occasion to state:

> At the very outset we might mention that **circumstantial evidence must be complete and conclusive before an accused can be convicted thereon**. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. *We must, however, guard against the danger of not considering circumstantial*
E *evidence in its proper perspective, e.g., where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of*
F *proof of circumstantial evidence would be defeated.*

The above cases have clearly laid down certain guidelines, whereupon in the absence of direct evidence, the prosecution may resort to adducing circumstantial evidence to discharge its burden. Crimes are usually committed in secret and under condition where concealment is highly probable. If direct evidence is insisted under all circumstances, a successful
G prosecution of vicious criminals, who have committed heinous crimes in secret or secluded places, would be near impossible. In this case not only was the heinous crime committed at a secluded place but the deceased's body was blasted beyond recognition. Only fragments of bones were found. (emphasis added)

H **[56]** The Court of Appeal case of *Yii Soon Ho v. PP* [2014] 1 LNS 386 considered the following leading authorities on the subject of circumstantial evidence, namely, *Sunny Ang v. PP* [1965] 1 LNS 171; *Jayaraman & Ors v. PP* [1982] 1 LNS 126; [1982] 2 MLJ 306; *PP v. Magendran Mohan* [2005] 3 CLJ 592; *Chan Chwen Kong v. PP* [1962] 1 LNS 22; [1962] MLJ 307;
I *Karam Singh v. PP* [1967] 1 LNS 65; [1967] 2 MLJ 25; and *Chang Kim Siong v. PP* [1967] 1 LNS 18; [1968] 1 MLJ 36.

[57] The illuminating judgment of Varghese George JCA in *Yii Soon Ho v. PP*, opined that the combined effect of all these cases was that a conviction based on circumstantial evidence was good in law if the cumulative effect of all evidence lead to an irresistible conclusion that it was the accused who committed the crime. This is what His Lordship said:

> Suffice it here to reproduce some guiding excerpts from the aforecited authorities, to support that position.
>
> In *Sunny Ang*'s case (where the deceased's body was never found) the Federal Court noted:
>
> > *… The second question to which I must draw your attention is that in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example - was it accident*?
>
> Thomson CJ's comments in *Chan Chwen Kong* were in the following terms:
>
> > *… where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the priso*ner?
>
> In *Karam Singh*, HT Ong FJ stated:
>
> > … **In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused** …
>
> And in *Chang Kim Siong*, the Federal Court emphasised that:
>
> > The onus on the prosecution where *the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient*. (emphasis added)

[58] It is thus clear that although a conviction can be sustained by reliance on circumstantial evidence, it must admit of no other possibility other than that it was the accused who committed the murder.

[59] From the available evidence, although there were three persons present at the scene including the accused, the following questions necessarily arise:

(a) Did all three beat up the deceased?

(b) If all three beat up the deceased what weapons if any, were used?

(c) Who among the three inflicted the fatal blow?

(d) Did only two of them beat up the deceased?

(e) Was it only the accused who beat up the deceased?

[60] These questions do not admit of any answers. More importantly, they do not all point to only one conclusion and one conclusion only that is that it was the accused who committed the act.

[61] If one hearkens back to the charge, it will be noticed that the charge does not state that the accused committed the act with another or others in furtherance of common intention pursuant to s. 34 of the Penal Code. The prosecution must thus adduce cogent proof that the evidence points to the accused alone as the perpetrator of the act.

Last Seen Together Concept

[62] The prosecution submitted that according to the "last seen together" principle, and because the deceased was last seen alive with the accused and SP9, this was sufficient to implicate and connect the accused to the crime.

[63] The recent Court of Appeal case of *Rakesh Kumar Thangagrajoo lwn. PP & Kes Lain* [2017] 1 LNS 502 discussed the said concept and held the following:

> Kami juga bersetuju dengan penghujahan Timbalan Pendakwa Raya berkenaan dengan pemakaian konsep "last seen together" seperti mana diputuskan dalam kes *Ashok v. State of Maharashtra* [2015] 4 Supreme Court 393. Dalam kes ini, Mahkamah Agung di India telah memutuskan seperti yang berikut:
>
> > The "last seen together" theory has been elucidated by this Court in *Trimukh Marotiu Kirkan v. State of Maharashtra*, [2006] 10 SCC 106, in the following words:
> >
> > > Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, the doctrine of last seen together shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him.
>
> In *Ram Gulab Chaudhary v. State of Bihar,* [2001] 8 SCC 311, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy.

In *Nika Ram v. State of H.P.,* [1972] 2 SCC 80, it was observed that the fact that the accused alone was with his wife in the house when she was murdered with a "Khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

The latest judgment on the point is *Kanhaiya Lal v. State of Rajasthan*, [2014] 4 SCC 715. In this case *this Court has held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.*

From the study of above stated judgments and many others delivered by this Court over a period of years, the rule can be summarised as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of accused. However, *in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of Indian Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused etc., non-explanation of death of the deceased, may lead to a presumption of guilt*. (emphasis added)

[64] The above authority which referred to several Indian decisions on the "last seen together" theory, neatly and succinctly states that where an accused is last seen with the deceased, in the absence of any plausible explanation by the accused, it can lead to a presumption of guilt although this is not necessarily conclusive.

[65] The problem with the application of the theory here is the fact that there was more than one person present at the scene. The theory would certainly work to the advantage of the prosecution if there was only one person present at the scene for then the particulars or special facts within his knowledge would require him to provide some explanation for what happened in order to discharge the burden.

[66] The particular facts of this case however makes the application of such theory fraught with difficulties. As stated earlier, the evidence discloses that there were three of them including the accused with the deceased at the scene. SP10 himself did not see what occurred while SP9's testimony was incomplete and untested by cross-examination.

[67] In any event, all the evidence does is place the accused with two others at the scene. As far as the testimony of PW13 is concerned that a person named Faiz informed him of the involvement of the accused, this is hearsay evidence as the said Faiz was not called to give evidence.

[68] In fact, evidence was led that although Faiz bin Badrolisam and Azlan bin Binsali were placed under a bond pursuant to s. 118 of the CPC, they could not be located even after warrants of arrest for them were issued.

Application To Admit The Statement Of SP9, Rosman Bin Karim, Under Section 32(1)(i) Of The Evidence Act 1950

[69] The prosecution applied to admit the s. 112 Criminal Procedure Code ("CPC") statement of SP9 by way of s. 32(1)(i) of the Evidence Act 1950 ("EA"). Although SP9 had given evidence during examination-in-chief, this was incomplete and he could not thereafter be traced to continue giving his evidence.

[70] The prosecution contended by virtue of the fact that all efforts were made to discern the whereabouts of SP9 without success, he was a person who "cannot be found" within the meaning of s. 32(1)(i) of the EA and therefore his statement ought to be admitted in evidence.

[71] SP16, Sergeant Arbain bin Dahlan, who was tasked with ascertaining the whereabouts of SP9, Rosman bin Karim, testified that his efforts to locate him proved unsuccessful.

[72] SP16 said that only during the third day of trial did he realise that SP9, while he gave evidence, was in fact remanded in the prison at Ulu Choh and that he was released sometime in 2018. SP16 then informed the court that SP9 had already served his sentence and was released.

[73] Thereafter, SP16 said that he went to the address of SP9 which was at Lot 5401-F, Jalan Jumaat, Kampung Ungku Mohsin but found there were only four blocks there. The first block was Lot 1 which was the "Bangunan Yayasan Pelajaran Johor", the second block was a hostel occupied by students and staff of the said "Yayasan", the third block was a Chinese temple while the fourth block was occupied by the "Kebajikan Akhlak Kanak-Kanak" or child welfare centre. This meant that the address of SP9 that SP16 had with him did not in fact exist.

[74] SP16 then said that he made efforts at the National Registration Department ("JPN"), Employees Provident Fund ("EPF") and advertised for information about SP9 after which he said that he left the feedback regarding the outcome to the investigating officer, Inspector Mazlan (SP17). SP17 said that he made efforts to locate SP9 and tendered in evidence exhs. P40, P41 and P42 in support. Exhibit P40 is a letter dated 29 December 2017 by SP17 to the Department Head of the Traffic Enforcement Division of the Royal Malaysian Police (PDRM) IPD Batu Pahat applying for an extract of the current address of SP9. P41 is a letter by SP17 dated 28 December 2017 addressed to the KWSP at Batu Pahat also for information regarding the latest address of SP9. P42 is a letter dated 7 January 2018 by SP17 addressed to the "Jabatan Pencegahan Jenayah

Keselamatan Komuniti" IPD Johor Bahru Selatan requesting that an advertisement be placed in the newspapers with the details of SP9 with a view to ascertaining his whereabouts. All of these efforts did not bear fruit.

[75] Section 32(1)(i) Evidence Act 1950 reads:

> 32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant
>
> (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> (i) when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law;

[76] In respect of the law on this subject, the case of *PP v. Mohd Jamil Yahya & Anor* [1993] 1 LNS 95; [1993] 3 MLJ 702 held as follows:

> The scope of the first principle may be briefly indicated by terming it the necessity principle. The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing. The second principle which is termed circumstantial guarantee of trustworthiness is in the nature of a practical substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner.

[77] In the case of *PP v. Michael Anayo Akabogu* [1995] 4 CLJ 79, it was held:

> The scope of the first principle may be briefly indicated by terming it the necessity principle. The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane or otherwise unavailable for the purpose of testing. The second principle which is termed circumstantial guarantee of trustworthiness, is in the nature of a practical substitute for the ordinary test of cross-examination.
>
> We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to the statements tested in the conventional manner.

[78] It has been held that a person whose whereabouts are unknown despite a proper search made is a person who "cannot be found". See *PP v. Lim Bong Kat & Anor* [1992] 4 CLJ 2173; [1992] 3 CLJ (Rep) 380. The application of the section is not automatic and sufficient evidence must be adduced to show that despite all efforts made the person could not be traced. See *DA Duncan v. PP* [1980] 1 LNS 12; [1980] 2 MLJ 195.

[79] The provision in s. 32(1)(i) was also considered in the case of *PP v. Lee Jun Ho & Ors* [2009] 4 CLJ 90; [2009] 3 MLJ 400, where the level of diligence expected on the part of the prosecution before the section could be invoked was stated in no uncertain terms as follows:

> *Section 32 of the Evidence Act 1950 is an exception to the general rule that hearsay evidence is inadmissible. Under s. 32(1) of the Act, one of the circumstances under which such a statement becomes admissible is where the person who made the statement 'cannot be found'*. This was the basis upon which the prosecution tried to invoke when they attempted to produce and tender ID66 and ID67. *For a witness to be clothed as 'who cannot be found' within the meaning of s. 32(1) of the Evidence Act 1950, such determination is a finding of fact, of which the onus is upon the prosecution to prove.*
>
> From facts adduced, I find that the police has failed to take all reasonably practicable steps to trace the witnesses. In fact there was not a single proactive effort by the police to procure the attendance of such material, relevant and important eye-witnesses.
>
> **There was no attempt to fully utilise the prevailing and available provisions of the Criminal Procedure Code, in order to secure the attendance of the witnesses**. The police failed to invoke the provisions of Criminal Procedure Code; which empowers the court to issue a warrant *in lieu* of or in addition to summon a witness and to require that person to execute a bond for his appearance in court. The police also failed to invoke the provisions of s. 118(1) of the Criminal Procedure Code whereby the police officer who desires any person, who is acquainted with the circumstances of a case, to be present in court, shall require that person to execute a bond to appear at the trial court. The prosecution also failed to utilise the provisions of s. 396 of the Criminal Procedure Code whereby the public prosecutor may apply to court for any witness of any sizeable offence that intends to leave Malaysia and that witness's presence at the trial to give evidence is fatal for the trial, to be committed to the civil prison until trial or until he shall give satisfactory security that he will give evidence at the trial.
>
> ... In view of the above circumstances especially of the omissions by the police to take all reasonably practicable steps in tracing the witnesses, and guided by the following cases (on s. 32(1) of the Evidence Act):
>
> (i) *Public Prosecutor v. Mohamed Said* [1982] 1 LNS 115; [1984] 1 MLJ 50;
>
> (ii) *Public Prosecutor v. Mohd Jamil Yahya & Anor* [1993] 1 LNS 95; [1993] 3 MLJ 702;
>
> (iii) *Public Prosecutor v. Gan Kwong* [1997] MLJU 144;; [1997] 2 CLJ Supp 433;
>
> (iv) *Public Prosecutor v. Chow Kam Meng* [2001] 7 CLJ 387; [2001] MLJU 386;
>
> (v) *Public Prosecutor v. Mogan Ayavoo* [2004] 3 CLJ 623; and
>
> (vi) *Public Prosecutor v. Norfaizal bin Mat (No 2)* [2008] 1 LNS 49; [2008] 7 MLJ 792.

> I hold that the prosecution has failed to meet the requirements and the prerequisites of s. 32(1) of the Evidence Act 1950. I accordingly ruled that the statements, ID66 and ID67 are inadmissible, as evidence for the prosecution. (emphasis added)

[80] The case makes it clear that the section is an exception to the hearsay rule and that the onus to prove that a person cannot be found lies squarely upon the shoulders of the prosecution.

[81] The application of s. 32(1) EA is therefore not automatic in nature. As it is an exception to the hearsay rule, the provision must be applied strictly. In this case, it was argued on behalf of the prosecution that SP9 was a person "who cannot be found" within the meaning of s. 32(1)(i).

[82] Applying the tests above to the facts of the case, the necessity principle entails asking the question, have the police taken all necessary steps to ascertain the whereabouts of the maker of the statement.

[83] Some of the available steps and procedures that can be invoked in order to secure the attendance of a potential witness are as follows:

(i) Issuing a summons under s. 34(2) of the Criminal Procedure Code (CPC) or requesting one to be issued by the court.

(ii) Invoking the inherent powers of the police as stipulated in s. 111(1) of the CPC to request the said witness to report to the nearest police station on a daily or weekly basis.

(iii) Requesting from the courts whilst investigations were still ongoing, the imposition of restrictions under s. 111(2) of the CPC.

(iv) Issuing a summons under s. 35 of the CPC to important witnesses well before any suspects were charged in court.

(v) Applying under s. 36 of the CPC to leave summonses at the last known address of the witness.

(vi) Having exhausted the above steps, to then issue a warrant of arrest under s. 47 of the CPC.

(vii) If having failed to effect arrest on the witness after issuing the warrant of arrest, to request the court to issue a warrant of arrest under s. 49 of the CPC.

(viii) Requiring the person to execute a bond pursuant to s. 118 CPC.

(ix) Should any of the above steps be still unsuccessful, to then place an advertisement in the local newspapers.

(x) Utilising the provisions of s. 404 of the CPC which allows for a bond to be executed against the witness with a guarantor to ensure attendance at court.

[84] SP9 testified on 24 February 2018 and gave only partial examination-in-chief after which he effectively disappeared and never showed up in court again. From the evidence, it is apparent that this was due to sheer negligence on the part of the authorities to realise that he was serving sentence in prison and to further ascertain his date of release.

[85] Also no attempt was made to utilise the available procedures under the CPC earlier outlined with a view to securing his attendance after his release.

[86] In the case of *PP v. Norfaizal Mat (No. 2)* [2008] 8 CLJ 576, it was held:

> *It was necessary for the prosecution and the police to make diligent search and reasonable exertion in order to procure Azril, otherwise the court is unable to come to a finding that Azril could not be found, in which case, his statement would be inadmissible under s. 32(1)(i) of the Evidence Act 1950.* Mere ignorance of the whereabouts of Azril was not sufficient to invoke the section. The efforts expended by the prosecution and the police herein were somewhat lackadaisical and lackluster. *Where the proceedings concern a capital charge warranting mandatory death sentence upon conviction, the court was reasonably entitled to expect more strenuous efforts of greater tenacity*. In the circumstances, ID26 could not be admitted as evidence. (emphasis added)

[87] Under all the circumstances, I find that the efforts made by the police including the steps taken by both SP16 and SP17 to locate SP9 came too late in the day and was due to sheer negligence in not realising that he was under detention in prison. I do not find under the circumstances that he was therefore a person who cannot be found.

[88] In premises, I ruled that the prosecution's application under s. 32(1)(i) EA be dismissed.

Conclusion

[89] Bereft of the statement of SP9, there is nothing to directly implicate the accused with the death of the deceased. The available evidence does not explicitly also exclude the involvement of the others present. It cannot be presumed that the accused either inflicted the fatal blow or was one of those who beat up the deceased with the others.

[90] It cannot also be assumed that the accused may have been guilty by virtue of the fact that he was present and did nothing to stop the others from beating up the deceased especially so in the absence of employing s. 34 of the Penal Code with regard to common intention. Mere suspicion cannot substitute for proof.

[91] There was also no forensic evidence to link the accused to the crime committed. It is also significant that the pathologist, SP14, who conducted the post mortem, agreed that it was possible that there was more than one person involved in the murder because the injuries were not only confined to the front and back but there were also injuries to the chest.

[92] SP14 also referred to injury no. 16 which she described as a tramline injury and that because more than one object was used to inflict the injuries, she concluded that there was more than one assailant.

[93] Under all the circumstances therefore, I find that the prosecution has failed to prove the third ingredient of the offence, namely that the injuries sustained by the deceased were caused or the result of the act of the accused.

[94] There was accordingly no need to go further and discuss which of the limbs under s. 300 Penal Code applied in this case.

[95] The individual strands of evidence in this case did not converge to form a rope strong enough to consign the accused to the fate of hanging. The circumstantial evidence in this case did not admit of one and only one conclusion and that is that the accused was responsible for the death of the deceased. There were unexplained gaps in the prosecution case. See *Chang Kim Siong v. PP* (*supra*).

Decision

[96] At the end of the prosecution case, a maximum evaluation of the evidence must be carried out in order to determine whether the prosecution has established a *prima facie* case. See *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215; [1999] 2 AMR 2017; [1999] 2 MLJ 1, *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 AMR 89, *Balachandran v. PP* [2005] 1 CLJ 85 and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 AMR 203.

[97] Having carefully sifted through the evidence on a maximum evaluation basis, I asked myself the all-important question, "were I to call for the defence of the accused and he elected to remain silent, would I convict him of the charge?" See *Looi Kow Chai & Anor v. PP* (*supra*). The answer was in the negative.

[98] I therefore find that the prosecution has failed to make out a *prima facie* case against the accused in respect of the charge of murder under s. 302 Penal Code.

[99] In accordance with s. 180(2) of the CPC, I acquit and discharge the accused without calling upon him to make his defence.